Petition

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No.

MIRIAM BILLINGS LEDESMA,
Petitioner

v.

STATE OF GEORGIA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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1.Whether the Fourth and Fifth Amendments permit, through any good faith exception or otherwise, a search subsequent to a warrantless arrest, based only upon a teletype saying the defendant was "wanted",where the police knew there was no warrant, no pending charges,nor probable cause.

2.Whether the Fourth Amendment permits a warrantless "weapons" search of a defendant's car where the defendant is already moved from the car and in custody.

3.Whether the Fourth Amendment permits a warrantless inventory search where there is no reason to impound the automobile, where the owner is present and the vehicle is parked on private property.

4.Whether the double jeopardy and ex post facto provisions of the Fifth and Fourteenth Amendments are violated by a subsequent statute which makes prior

conviction an essential element of a new crime and provides the basis for a second conviction and sentence.

5.Whether the Second, Fifth and Fourteenth Amendments permit a blanket proscription against convicted felons carrying a gun in any situation.

6.Whether the Fifth, Sixth and Fourteenth Amendments protect a defendant from the arbitrary and discriminatory application of state law, in derogation of clear statutory mandate and established case law; when in fact, during the course of trial preparation and trial the defendant relied on the established laws only to find that the state courts would not apply the laws in her case.

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OPINIONS BELOW

The Petitioner was convicted by a jury on December 2, 1982 (T120). The decision of the Supreme Court of Georgia, affirming her conviction was entered on September 7, 1983 and is set forth in Appendix A, as modified on October 5, 1983. Petitioner's Motion for Rehearing was denied on October 5, 1983 and is set forth in Appendix B. The decision is reported at 251 Ga. _____ (1983).

JURISDICTION

The judgment of the Supreme Court of Georgia, denying Petitioner's Motion for Rehearing was denied on October 5, 1983. Jurisdiction is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in crises arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any persons be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed,

which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law: nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Petitioner received two one year concurrent sentences, after being convicted by a jury for possession of

a gun by a felon (OCGA 16-11-131) and for possession of seven phentermine tablets (OCGA 16-13-1 et seq.). The Petitioner herein as a forty-year-old female with two children, Danielle, 11, and Michael, 21 (T69).

The State's case consisted only of circumstantial evidence. The gun was found in the car in a man's closed pouch (T45,76). The officer who found it could not tell it held a gun until he picked it up and felt it (MT45). He could not recall exactly where he found it, saying it could have been on the front seat, under the front seat, or in the back seat area (T35,47,50,76). The pills were found in the front ashtray of the car located in the middle of the dash (T26). The defendant made no statements (MT66).

Although the defendant was the sole occupant of the car, the defendant put on evidence of equal access (T72,73,78). The car from which the drugs were seized was registered to the defendant and her husband (T70-72). The police knew this as Norton testified the car was hers and her husband's as the "tag was run" and "I saw the title on the car" (T56). The bill of sale to the defendant and her husband was admitted into evidence (T82, 145). Other people also used the car including her sister and her driver, Armando (T73,78). The State did not rebut this evidence but rested on their presumption (T82).

The State conceded that the defendant was arrested without warrant pursuant to OCGA 17-13-34 (Ga. Code Ann. 44-414)(MT 17).

"The arrest of a person may be lawfully made also by any peace officer or private person, without a warrant upon reasonable information that the accused stands charged in the courts of a State with a crime punishable by death or imprisonment for a term exceeding one year, but when so arrested the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against him under oath setting forth the ground for the arrest as in the preceding section; and thereafter his answer whall be heard as if he had been arrested on a warrant."

Prior to trial,the defendant filed a demurrer and motion to dismiss contending that the aforesaid statute was unconstitutional and that it allowed for an arrest based upon less than probable cause and because its language vests law enforcement officials with unbridled discretion in determining who to arrest without a warrant (R43,33).

The evidence showed, and the State conceded, that there never was a warrant in any State for the defendant at the time

of her arrest nor subsequent thereto (MT29). Nor was the defendant, at the time of her arrest "charged in the courts of a state with a crime" (MT29). Trial court upheld the arrest because it found the officers made it in good faith because it was reasonable to believe that the defendant was charged in the courts of another state, and it was reasonable to believe a warrant had issued (MT 143-146).

The Supreme Court of Georgia on direct appeal sidestepped the good faith issue, but couched its language in good faith terms in finding probable cause:

> The arresting officers testified at trial that they believed that a warrant had been issued in MIssouri. This belief was based on reliable information from Missouri officials that the issuance of a warrant was imminent charging her with a violation of the Missouri Controlled Substance Act. When they received the message that Miriam Ledesma was wanted,

they interpreted this to mean that the warrant had been issued. Even if this mistaken interpretation did not meet the requirements of the statute that the officers have reasonable information that she was charged in the courts of another state with a crime punishable by death or a prison term exceeding one year, it does amount to probable cause to arrest which is the applicable standard for a warrantless arrest in Georgia (Appendix A, pg. 7a and 8a).

On the morning of September 14, 1982, Detective Norton* received a teletype from St. Louis, Missouri, which he admitted said only that the defendant was "wanted" and not that there was an outstanding warrant (MT30). The teletype said:

"Hillsdale Police Department 091482 Attn Det Norton and Det Miller Fulton

*Three officers participated in this case: Detectives Norton and Miller of Fulton County and Officer Hernandez of the Atlanta Police Department. Although Norton denied any one of the three was in charge of this case (MT47), Norton was the senior officer (MT127). Furthermore, Miller thought Norton to be in charge (MT127).

County Pd Wanted subjects for Hillsdale PD Auth Sgt Brackney 2269 Pupo Jesus Cuban Male - Age 43 - DOB 120238- HT 510-Wgt 220 Bld Hvy-Skin Drk-Eyes Bro-Hair Blk-Soc 265218219 R Add 714 Hileah Fl 090582Wnt Fel Violation Mo Controlled Substance Law Sal RS 195020 413040 3599 Alias Jesus Pupo Mesa OCA 82-566 061582 Ledesma Miriam Age 37-DOB 090643-POB Atlanta Ga HT 502-Wgt 1400Bld Hvy-Skin Med-Eyes Bro-Hair Blk SOC 257682131-R Add 4031 Eisteria Lane Atlanta 052980 Alias Mildred Edmonds Miriam Billings Miriam Ann Billings Wnt Fel Violation Mo Controlled Substance Law Sale OCA 82-566 061582 RS 195020 413040 3599 Oper Gordon EOMR"

Norton said he was expecting the teletype because "On the day before, I received a telephone call from Sgt. Brackney, St. Louis County, I believe, advising that they were issuing warrants for her." Sgt. Brockney was the only person in St. Louis that the police testified they dealt with on this matter. "I advised him to either send us a warrant or teletype confirming that." (MT32). All the officers who testified had been

involved in a three and one-half month investigation involving the defendant (MT 88). Although Norton said he was expecting the teletype, Norton did not know any details of the charges and only that it was for some drug violation (MT55). Officer Hernandez thought it had something to do with missing persons (MT97). After Norton received the teletype, neither he, nor his fellow officers, made any attempt to verify or check the teletype (MT39). Although he got the teletype at 8:30 or 9:00 a.m. on September 14, he did not make any attempt to pick up the defendant until 6:30 or 7:00 p.m. (MT52). Norton admitted he was never told warrants were issued for the defendant (MT56). In fact, he called St. Louis County after the arrest, and the officials there still did not tell him there was a warrant (MT 60).

Officer Hernandez claimed she knew "through my partners and Sgt. Brackney" that there was a warrant for Ledesma "at lease" a couple of days before September 14, 1982 (MT89). But she admitted in the 2 or 3 conversations she had with Brackney before arresting Ledesma that Brackney never told her he had a warrant (MT90). Even though she admitted the teletype did not say there was a warrant or that the defendant was charged in the courts of another state, she said that the teletype was verification that there was a warrant (MT91). In reviewing the teletype on the stand, she stated that she could not point out the word warrant or a warrant number (MT93,94).

Brackney, called by the defendant, specifically stated that he never had a warrant and never told any law enforcement agency or any of the officers here

involved that he had a warrant (MT102). He stated he told Norton on September 14, 1982, that he had a "wanted". (MT103). Norton denied having any conversations with Brackney on September 14, 1982. When asked "Did you tell him (Norton) that you had a warrant on the 13th or 14th," Brackney responded, "No." (MT116). Brackney stated that the purpose of the wanted was so that the defendant could be picked up in Atlanta and he could come down and talk with her (MT115). In fact he did come to Atlanta on either the 15th or 16th of September, but the defendant decided not to talk so he never obtained a statement (MT106,112,113). In fact, Brackney had driven to Atlanta previously when told by these same officers that the defendant would give a statement (MT104). But the defendant refused then, on August 30, 1982, to give Brackney a statement

(MT104).

Detective Miller admitted he understood the teletype did not verify the existence of a warrant but said, "I understood it was valid enough to pick up the person." (MT127). The defense also subpoenaed and called Mark Miller, from the St. Louis prosecutor's office, who testified that the police department issued a wanted for the defendant, explaining:

"Now, basically, we have what's known as a Hold Twenty in St. Louis County before a warrant is issued. We really require that the defendant be arrested and the police officers talk to them about the particular charges that are issued. Then in that twenty hour period, subsequent to their arrest, their discussions with a particular defendant, we reach a decision whether or not to issue warrants, arrest warrants, complaints, whatever." (MT135).

Miller testified that at the time Ledesma was picked up, the Fulton County police officials knew Ledesma was not charged in the courts of Missouri (MT137). In fact,

arrest papers for her." (MT35).

Norton said that when he advised the defendant she was under arrest: "The door (of her car) was opened, standing in the doorway of the car." (MT35). On cross-examination, he reiterated that the defendant was standing beside the car at the time of her arrest (T47). Hernandez testified that when they drove up, the defendant was "six to eight feet away from (her) open car door." (MT81). Officer Hernandez testified that the police car pulled up on the passenger side of the defendant's car, directly contradicting Norton's statement (MT79). "The door to her car was open, but she was on the other side between the unmarked car and her passenger door." Of the location of the car, Norton said: "It was pulled - when you come off Martin Luther King into the parking lot, you have parking spaces.

It was pulled into the parking space. We pulled in on the far side of the car into the adjoining parking space." (MT36). Norton said they parked on the driver's side (MT36).

Norton said they first searched the defendant and placed her in the police car: "Detective Hernandez, who's a female, searched her person. Then we placed her in the car." (MT40). Hernandez testified: "We put her hands on the top to the rear of our unmarked car. I searched her and placed her in the back seat of the unmarked car." (MT79). Norton said the defendant was standing beside the police car when she was searched (MT40,41). At the police car when she was searc hed (MT40,41). At the time she was searched, the defendant was not trying to run away or get into her car, Nor-

ton said (MT42). After placing her in the police car, they then searched her car (MT40). Hernandez said that while she was searching the defendant, the other officers were searching the car (MT80).

Norton said that he personally searched the car at this point (MT43, 46). He said he effected the search by sitting down in the front seat of the car (MT43). Norton said he not only searched the front seat area, but "I pulled the back seat of it, see if anything was laying in the floorboard." (MT43). Norton pulled her pocketbook from the front seat (MT35). "Also there was a little brown, I'd say, dark colored zipper pouch pulled from the car which had a weapon in it." (MT35). Norton said he personally found the gun, but couldn't remember where he found it. He admitted

the gun had been under the front seat or in the back seat area (MT44). "I just can't for sure say the front seat is where I'm trying to say it was." (MT45). The gun was in a closed black colored pouch (MT35). Norton admitted that he couldn't tell if the pouch had a weapon in it except by feeling it: "You could hold it and feel the weapon." (MT45).

Although the car was searched at the time of the defendant's arrest, Norton made a decision to impound the car (MT36). He impounded the car because: "They was several items in the car that our rules and regulations, our standard operating procedures requires that we put those in safekeeping when we impound a car." (MT 36). Norton said the car was impounded pursuant to a Fulton County Police Department Standard Operating Procedure (SOP)

rule that says "When we arrest someone on private property that we impound the vehicle and take their personal belongings into safe keeping" (MT37).

Norton cited an undated SOP Rule 23.3 (D)(1)(d) stating cars will be towed on all arrests when: "The driver or owner of a vehicle is arrested and has parked the vehicle on private property; the arresting officer has the authority to remove said vehicle for impoundment and safekeeping." (MT163). But the same SOP also states: "If the person in charge of said vehicle prefers, he may leave the auto at the scene of the incident providing it can be parked next to the curb or out of the roadway in a manner not creating a hazard to other traffic." (MT162).

The trial court ruled that this search was a good faith search because it was

done pursuant to an "official policy" of the police department (MT144). The trial court admitted the SOP was conflicting and contradictory on this point (MT158). The trial court also upheld the search based on evidence not in the record: "As I say, I don't know where it appears from this evidence this investigation was much wider than this one case. I think the record shows. I'm aware of that. I don't know what all's involved in it. I'm aware what has been said here. I'm taking into consideration that for what it's worth." (MT158). The Supreme Court of Georgia simply ruled that the "inventory search" was valid. (Appendix A, pg. 5a).

Norton said he ordered the car impounded but did not ask the defendant what she wanted done with the car or

ask her what wrecker service she wanted to tow the car (MT48). While Norton said he did not check the vehicle registration to ascertain the owner (MT48), he admitted that he knew that the car was registered to the defendant and her husband (MT48, T56). He also knew the defendant had just left her mother's, knew where her mother lived, only one and a half miles from the scene of the arrest (MT34). Norton answered yes to the question: "It's your testimony, then, that you impounded the vehicle for only that reason, for the reason you felt like you had to secure the personal items and valuables in the car, is that your testimony?" (MT49).

No search warrant was procured for this second impoundment search (MT75). Detective McDonald testified he helped Norton conduct the impoundment search at

the police station (MT67). McDonald found the Phentermine pills in an "open" ashtray in the front dash of the car (MT68). The pills were contained in a Co-Tylenol pill bottle that was closed (MT68). Norton said he had seen the pill bottle while sitting in the front seat at the scene of the arrest but "didn't examine it." (MT63). The police had seized the car keys at the place of the arrest (MT88).

REASONS FOR ALLOWING THE WRIT

I. THE DECISION BELOW, UPHOLDING THE ARREST AND SUBSEQUENT SEARCH AND SEIZURE ON THE GROUND THAT PROBABLE CAUSE WAS ESTABLISHED BY THE POLICEMEN'S "ASSUMPTION" THAT AN ARREST WARRANT WOULD FOLLOW A TELETYPE WHICH SAID ONLY THAT THE DEFENDANT WAS "WANTED", OR ALTERNATIVELY, THE FINDING THAT THE TELETYPE ITSELF ESTABLISHED PROBABLE CAUSE BY VERIFYING THE EXISTENCE OF A WARRANT, CONFLICTS WITH DECISIONS OF THE UNITED STATES SUPREME COURT AND THE FOURTH AMENDMENT.

Although the police and the trial court offered the theory that the teletype veri-

fied the existence of a warrant, the Supreme Court of Georgia found, contradictory to this, that the arrest was based on probable cause because the police had a right to assume a warrant would follow the teletype. The teletype the arresting officers received did not say there was a warrant, or that it would be followed by a warrant. In fact, there was no warrant, nor was the defendant "charged in the courts of a state with a crime." Nor did a warrant ever issue. See OCGA 17-13-34 (Ga. Code Ann. 44-414). The Missouri officer, who sent the teletype, testified he was in contact on September 14 with Fulton County officers and he never told the Fulton officers there was a warrant. The Fulton officers waited over 10 hours after receipt of the teletype to effect the arrest of the defendant.

When an arrest is made on an alleged warrant which the officer learned about in a radio bulleting the arrest is illegal unless there is not only a warrant, but a warrant supported by probable cause. Whiteley v. Warden, 401 U.S. 560, 91 S.Ct. 1031 (1971). In Whiteley, the officer seized the defendant based on a radio bulleting that there was a warrant for the defendant. In fact, there was a warrant, but it was not supported by probable cause. Nevertheless, the arrest was invalid:

> Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest. Whiteley, supra, 401 U.S. at 568.

Here the facts are even more compelling, because there was no warrant at all; there was no communication verifying the warrant; and, unlike the arresting officer in Whiteley, the arresting officer here did have the time and resources to verify the warrant.

"The decisions of this court concerning Fourth Amendment probable cause requirements before a warrant for either arrest or search can issue require that the judicial officer issuing such warrant be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant." Whiteley, supra, 401 U.S. at 564. In warrantless arrest, the same standards apply for reviewing a police officer's assessment of probable cause: "(L)ess stringent standards for reviewing the

officer's discretion in effecting a warrantless arrest and search would discourage resort to procedures for obtaining a warrant. Thus the standards applicable to the factual basis supporting the officer's probable cause assessment at the time of the challenged arrest and search are at least as stringent as the standards applied with respect to the magistrate's assessment. Id. 401 U.S. at 566. In Ker v. California, 374 U.S. 23, 83 S.Ct. 1623 (1963), the Court held that the same probable cause standards for arrests were applicable to state arrests. "An arrest and search, legal under federal law, are legal under state law." Durden v. State, 250 Ga. 325, 327 (1982).

The decisions of the courts of Georgia have previously adhered to the

proposition that for an arrest to be legal, the police must have probable cause or a warrant which suffices for probable cause. "We reverse. It does not appear that at the time of the defendant's arrest, the police had probable cause for an arrest, and since it was without a warrant, the arrest was unlawful." Bethea v. State, 127 Ga. App. 97, 98 (1972). A warrant which on its face shows it is not supported by probable cause is illegal and will not support an arrest or search subsequent to the arrest. Good v. State, 127 Ga. App. 775, 776 (1972). "Where the defendant has committed no crime in the presence of the arresting officer, and the latter has no valid warrant, the arrest without a warrant will not justify the search, the result of which forms

(Appendix A, ps. 8a)) and the Missouri officer had no warrant or charge pending. Police "bookings" for "investigation" and "on suspicion" are illegal. Collins v. United States, 289 F.2d 129 (5th Cir. 1963). Staples v. United States, 320 F.2d 817 (5th Cir. 1963). Extradition arrests cannot be made on a lesser basis than Fourth Amendment probable cause. Kirkland v. Preston, 385 F.2d 670 (D.C. Cir. 1967). "But when the extradition papers rely on a mere affidavit, even where supported by a warrant of arrest, there is no assurance of probable cause unless it is spelled out in the affidavit itself." Id., at 676.

The facts of the case here are similar to Batton v. Griffin, 240 Ga. 450 (1978). There the court found: "No arrest warrant or indictment accompanied the requisition, only two 'Juvenile Petitions' and 'Deten-

tion Orders.' So far as we can tell, no determination of probable cause to arrest Petitioner was made by any magistrate in North Carolina, and none is necessary for the issuance of these documents under the law of that state." Id., 450, 451. The court found the arrest illegal, saying "No arrest warrant was issued, and no indictment was returned." Id, at 252. The court ruled theprocedure employed by the demanding state to be constitutionally deficient because, as here, the procedure "does not require any determination of probable cause to arrest as a prerequisite" to the arrest. Id., at 252. Missouri's "hold 20" procedure is no different from the North Carolina juvenile hold procedure condemned in Batton. The Missouri procedure also closely resembles the procedures condemned in Staples, supra, and

Collins, supra. Similarly, in Ierardi v. Gunter, 528 F.2d 929, 931 (1st Cir. 1976), that court held that a prosecutor's information, certainly more reliable than the teletype, unsupported by any further evidence of probable cause, is insufficient to support an arrest.

The arrest and search must fail also because the State has failed to show the second prerequisite for an arrest under OCGA 17-13-34 (Ga. Code Ann. 44-414). That second prerequisite is that the defendant has fled from justice. See Bearden v. State, 223 Ga. 380, 382 (1967). Indeed the court in Batton, supra, at 452, found that "further flight" was a precondition of the use of OCGA 17-3-34 to support an arrest. In Wisconsin v. Hughes, 229 NW2d 655, 661 (Wis. S.Ct. 1975), that court held that there were two ele-

ments necessary to support an arrest under this section of the Extradition Act.: "That the defendant is charged with a crime under the laws of another state and that he is a figitive from that state." Here, neither element is present. Whatever the requirements of the Extradition Act, an arrest must always meet the probable cause standard: "(A)n arrest is constitutionally valid if, at the moment the arrest is made, the facts and circumstances within the knowledge of the arresting officer and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the accused had committed or was committing an offense." Durden v. State, 250 Ga. 325, 326 (1982), citing Beck v. Ohio, 379 U.S. 91, 85 S.Ct. 223 (1964).

Well established case law precludes a finding that the search subsequent to the illegal arrest should be allowed based on the "good faith" exception. See Whiteley, supra, 401 U.S. at 568: "(t)he Laramie police were entitled to act on the strength of the radio bulletin ... but an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest." Accord John v. State, 111 Ga. App. 298, 309 (1965): "The arrest, being unlawful itself, afforded no basis for making the search."

In Berry v. State, 163 Ga. App. 705, 711 (1982), that court noted the Georgia courts have never recognized the "judicially legislated 'good faith' exception to the judicially created 'exclusionary

rule,'" created in United States v. Williams, 622 F.2d 830 (5th Cir. 1980).

Moreover, the Fifth Circuit has expressly stated that the good faith exception does not apply to the facts of this case. See United States v. Garcia, 676 F.2d 1086, 1094 (5th Cir. 1982):

> Under Texas law, an arresting officer's good faith does not suffice to purge an unlawful arrest of its illegality insofar as the exclusion of evidence is concerned. Thus in Green v. State, 615 S.W.2d 700 (Tex. Cr. App. 1980), cert denied, U.S. , 102 S.Ct. 490, (1981), the court excluded evidence obtained as the fruit of an arrest made pursuant to an invalid arrest warrant. The majority did not accept the argument urged in dissent that the evidence should be admissible by virtue of a good faith exception such as that set forth in U.S. v. Williams. It is not this Court's role to engraft a "good faith" exception onto Texas jurisprudence. Thus in this case, where an arrest was unlawful under Texas statutes, the game warden's good or bad faith can have no bearing on our decision to exclude the illegally obtained evidence.

As the court noted in Berry, supra, at 711, the good faith exception "was apparently fashioned from the 'good faith and probable cause' for tort liability for police officers' acts in arresting a suspect without a warrant in good faith." But if, as here, the officer's actions violated the defendant's clearly established constitutional rights, there is no good faith exception. Harlow v. Fitzgerald, 102 S.Ct. 2727 (1982); Wood v. Strickland, 420 U.S. 308 (1975). An arrest by warrant on probable cause is a clearly established right as argued infra. Furthermore, the burden to establish the good faith defense was on the State. Williams, supra, 622 F.2d at 847. Clearly, the officers did not have authority to arrest without a warrant, without probable cause, based only on

a teletype that said "wanted" for a defendant that they had been investigating and where they had not been told there was a warrant, and, in fact, were in contact with the sending officer after they received the teletype.

Although the State relies on the "reasonable information" section of the statute in question, the officers testified they relied not on the statute but on the teletype which they believed constituted notice of an outstanding warrant. In fact, the teletype did not say there was a warrant, nor was there any communication that there was a warrant. Therefore, the good faith exception must fail as the actions of the officers were not based upon any specific statutory authorization, case law, or other legal authority as envisioned in Harlow v.

Fitzgerald, supra. Cf. Williams v. Treen, 671 F.2d 892 (5th Cir. 1982), which also holds that both a clearly established right and a good faith exception may be established by state laws or regulations. The officers here did not point to any state laws or regulations that they relied on, nor do any exist.

Harlow establishes four factors that must be addressed in determining the good faith exception. First, what was the state of the law? If, as here, the law was clearly established (see Whiteley, supra, and Harper, supra), the good faith defense is defeated. Second, did the defendant in fact rely on the relevant legal authority? Again, the officers did not rely on the statute but on a belief that a warrant had issued. Furthermore, the extradition statute does not obviate the

the need for probable cause and a warrant. Whiteley, supra; In Re Conslavi, 382 NE2d 734, 737 (Mass. S.Ct. 1978). The third consideration is whether the officer took reasonable steps to determine the legality of his actions. The answer here again is no. They did not, in fact, even correctly read the teletype. Nor did they check with Missouri to confirm the existence of a warrant even though they waited over 10 hours to effect the arrest. "Officers have a duty not only to know the laws in an area in which they work but to take reasonable steps to ascertain whether their actions are lawful, beyond simply relying on their own idea of what the law might be." Glasson v. City of Louisville, 518 F.2d 899 (6th Cir. 1975). The fourth question is whether

the officers had an improper ulterior motive which undercuts a claim of good faith. The evidence shows that the officers had been investigating the defendant for several months and were eager to make a case against her.

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE CONFLICTS WITH THE LOWER COURTS THAT CONTINUE TO ERODE THE FOURTH AMENDMENT'S PROSCRIPTION AGAINST WARRANTLESS "WEAPONS" SEARCHES OF AUTOMOBILES WHERE THE DEFENDANT IS ALREADY REMOVED THEREFROM AND IN CUSTODY.

Assuming the arrest was legal, the search which yielded the gun was beyond the scope of a search incident to an arrest. Belton v. New York, 453 U.S. 454, 101 S. Ct. 2680 (1981). A search incident to arrest is limited to the immediate area where the defendant is at the time of the arrest. Preston v. United States, 376 U.S. 364, 367, 84 S.Ct. 881 (1964). The defendant here was a lone forty-year old woman. She was

already out of the car when she was arrested. Three policmen effectuated the arrest. At the time of the search of the passenger compartment one officer had the defendant up against the police car, if not in the police car. The arrest was for an out of state charge and the state made no claim that the search was for evidence realted to the offense for which the arrest was made. Cf. Chimel v. California, 395 U.S. 752,763, 89 S.Ct. 2034 (1969).

In Belton,supra, the Court identified several factors for determining whether a search of the passenger car is within the scope of the arrest. Those factors are not present here. The passenger compartment was not within the reach of the arrestee as the defendant was up against the police car or actually in the police car. Here there was no suspicion that there were drugs or contraband in the car. Here there were

three policemen and one arrestee as compared to the one officer and four arrestees in Belton.

Moreover the gun was found in a closed container. "A search incident to arrest does not authorize the police to search closed containers which do not reveal their contents or dispose them to plain view." United States v. Ross, U.S. , 102 S.Ct. 2157,2167 (1982). "(A) warrant is generally required before personal luggage can be searched, and the extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile." Arkansas v. Sanders, 442 U.S. 753,764 fn.13, 99 S.Ct. 2586 (1976). Accord United States v. Bloomfield, 594 F.2d (8th Cir. 1979), where that court held that the officers exceeded the scope of a permissible search where they opened a tightly zipped knapsack.

ask the defendant what she wanted done with the car. An impoundment is not necessary where "the evidence affirmatively shows that (the) automobile was safely parked off the street, that it had not been used to store or carry drugs, nor had it been involved in the drug sale in any way." Dunkum v. State, 138 Ga. App. 321, 325 (1976). Accord United States v. Nelson, 511 F. Supp. 77,81 (W.D. Tex. 1980). "Where the officer knows the identity of the owner in question, he should make at least a reasonable effort to determine the owner's wishes regarding disposition of the vehicle and that only after such reasonable is made should the necessity of impoundment attach." State v. Darabis, 159 Ga. App. 121, 123 (1981).

Furthermore, the second impoundment search at the police station was illegal in that it was done without a warrant.

Arkansas v. Sanders, 442 U.S. 753, 762 (1979). Certainly opening the pill bottle was beyond the scope of the inventory search. United States v. Bloomfield, 594 F.2d 200 (8th Cir. 1979). Accord United States v. Bosly, 675 F.2d 1174 (11th Cir. 1982), which held that the officers had no right to look into the trunk of the car during an inventory search of the vehicle.

As argued above, the rules and regulations of the Fulton County Police Department are not the authority envisioned in United States v. Williams, supra, and Harlow v. Fitzgerald, supra, to support the good faith exception. Although the trial court upheld the impoundment search based only on the good-faith exception the Georgia Supreme Court simply said the impoundment search was authorized without giving any reason.

IV. THE COURT BELOW HAS DECIDED AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT AS TO WHETHER THE DOUBLE JEOPARDY AND EX POST FACTO PROVISIONS OF THE FIFTH AMENDMENT ARE VIOLATED BY A SUBSEQUENT STATE STATUTE WHICH MAKES PRIOR CONVICTIONS AN ESSENTIAL ELEMENT OF THE NEW CRIME.

Prior to trial the defendant timely filed a motion challenging, on it face and as applied, the constitutionality of OCGA 16-11-131 (Ga. Code Ann. 26-2914) (Appendix C, Pg. 16a). he statute became effective July 1, 1980 (MT 8). The two convictions alleged in the indictment ocurred prior to July 1, 1980 (MT 8-11, R3,4).

"As a general rule, any law is ex post facto which is enacted after the offense was committed, and which, in relation to its consequences, alters the situation of the accused to his disadvantage." Thompson v. Missouri, 171 U.S. 380, 18 S.Ct. 922 (1898). "In general, 'any law which was passed after the commission of the offense

for which the party is being tried is an ex post facto law when it inflicts a greater punishment that the law annexed to the crime at the time it was committed, or which alters the situation of the accused to his disadvantage.'" In Re Midley, 134 U.S. 160,171, 10 S.Ct. 384 (1890).

The statute here not only authorizes a second punishment but makes the previous conviction an essential element of the crime of possession of a firearm by a convicted felon. See Adkins v. State, 164 Ga. App. 273,274 (1982): "However, under the count for possession of a firearm by a convicted felon, an essential element of that count is his prior conviction of a felony and his possession thereafter of a firearm." Therefore as set out in Brown v. Ohio,432 U.S. 161, 97 S.Ct. 2221 (1977), the statute violates double jeopardy.

V. THE COURT BELOW, IN FASHIONING A BLANKET PROSCRIPTION AGAINST FELONS CARRYING A GUN UNDER ANY SET OF CIRCUMSTANCES, HAS DECIDED AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT, AND ESPECIALLY SO, BECAUSE THE DECISION IS IN CONFLICT WITH DECISIONS OF FEDEPAL COURTS.

Over objection, the trial judge charged the jury the substance of the felony gun possession statute (Appendic C) and counsel reserved further objections for direct appeal (T 108,109). The court was requested to give a charge to the jury in the language of OCGA 16-11-126(c) (Ga. Code Ann. 26-2901) (t 109, R 88). The defendant also requested the court to charge the jury that in order to violate the statute "That the defendant did carry the pistol by her person outside her home, motor vehicle or place of business" (T108, R88). The defendant requested a charge upon sudden emergency: "I charge you that when one suddenly upon an emergency acquires the possession

of a pistol for the purpose of defending herself or her family or her property, she is not guilty of carrying a pistol without a license in violation of the law." (T108,R89). The defendant also requested a charge on specific intent (T108R86). This charge was directed at the gun possession charge. The Supreme Court of Georgia summarily rejected, without any reasoning, these challenges and requests, thereby upholding a blanket prosecription against this defendant for carrying a gun under any set of circumstances.

The defendant testified that she had been a victim of an armed robbery only three months before her arrest (T73). The defendant also attempted to state that she had been a victim of a burglary in October of 1982 (T74). But

the district attorney objected, saying: "I object and move to strike any alleged burglary on the grounds it's immaterial to any defense that can be made for carrying the gun on the 14th of September." (T74). The court, after conferring with counsel at bench, sustained the objection, saying: "Stay away from the burglary and robbery. They have nothing to do with this case." (T74). The Supreme Court of Georgia gave no reason and cited no cases in depriving the defendant of these defenses (Appendix 12a).

The blanket proscription of OCGA 16-11-131 (Ga. Code Ann. 26-2914) as charged by the trial judge violates the Second, Fifth and Fourteenth Amendments of the United States Constitution as well as similar provisions of the Georgia Constitution in that the charge

and law are vague and overbroad in that it proscribes possession of a firearm for situations in which the use of a firearm by the convicted felon is necessary because of a sudden emergency or self-defense. The defendant not only reserved her objections for appeal but objected to the charge and requested a charge on sudden emergency and specific intent. The evidence here does support the objection and request; and, therefore, the defendant has standing to make this attack. See Foster v. State, 250 Ga. 269, 270 (1982); United States v. Scales, 599 F.2d 78 (5th Cir. 1979), United States v. Hammons, 566 F.2d 1301 (5th Cir. 1978). "While it is true that where one suddenly, upon an emergency, acquires manual possession of a pistol for the purpose of defending

himself, his family, or his property, his not guilty of carrying a pistol without a license in violation of the Code. Caldwell v. State, 58 Ga. App. 408 (1938). This is a judicially engrafted exception. Williams v. State, 12 Ga. App. 84 (1913); Amos v. State, 13 Ga. App. 140 (1913); Harris v. State, 15 Ga. App. 315 (1914).

Furthermore, the blanket proscription is overbroad in that it makes it unlawful for convicted felons to even have guns in their house, vehicle, or place of business. OCGA 16-11-128 (Ga. Code Ann. 26-2903) provides that a person may have in their home, car, or place of business a pistol, even without a license. The appellate courts have created other exceptions. One may carry a

pistol home from the place of purchase without first obtaining a license. Modestte v. State, 115 Ga. 582 (1902). One who finds a pistol on the road may carry it home for safekeeping. Cosper v. State, 13 Ga. App. 301 (1913). One may hold and examine a pistol to determine whether he wishes to buy it. Jackson v. State, 12 Ga. App. 427 (1913). "The act (forbidding the carrying of a pistol without a license) should receive a reasonable construction." Strickland v. State, 137 Ga. 1 (1911). If even a convicted felon is entitled to a firearm in an emergency, clearly, to effectuate his self defense, this gun would have to be located in his home, vehicle or place of business. For example, if he has to go borrow

or buy a firearm, it might be too late for him to aid himself, or his family, or the emergency might otherwise have passed. The proscription of the statute here is, therefore, overbroad. "(I)t is apparent that the right to carry arms, guaranteed by the Constitution (the exercise of which may be regulated but cannot be prohibited), is one of habitude". Cosper, supra, at 306.

The Georgia court has numerous times, in an unbroken line of cases until now, declared blanket bans on firearms unconstitutional. "A law which merely inhibits the waring of certain weapons in a concealed manner is valid. But so far as it cuts off the exercise of the right of the citizen altogether to bear arms, or under the color of proscribing the mode,

renders that right itself useless, it is in conflict with the Constitution and void." Strickland v. State, 137 Ga. 1, 8 (1911), quoting Nunn v. State, 1 Ga. 243 (1846) (T108,R86).

The defendant also requested that the court charge on specific intent in relation to the gun charge. The necessity of charging on specific intent for possession of firearms was explained in Cosper, supra, at 303: "The charge of the trial judge practically eliminated the defendant's statement from the case, and was a holding that, as a matter of law, one has no right to pick up a pistol lying in the public road, no matter what may be his purpose in doing so." Continuing the court said at 304:

"But we are not prepared to hold that if in any case it should plainly appear that the carrying was a mere temporary incident, due to an emergency of some kind or absolute necessity for the transportation of the property and its preservation or to prevent a breach of the peace -- perhaps a homicide, one who could show a good reason for not having taken out a license, in the fact that he had never owned a pistol, should be subjected to punishment for failure to take out a license." The Cosper court clearly warned that specific intent was an element of the crime of possession of a gun: "(T)he gravaman of the offense consists in the particular intention with which the act was done." Id.,304.

Second, the Georgia courts refused to address, at all, the propriety of the impoundment search and in doing so refused to apply the mandate of State v. Darabaris, 159 Ga. App. 121, 123 (1981): "Where the officer knows the identity of the owner in question, he should make at least a reasonable effort to determine the owner's wishes regarding disposition of the vehicle and that only after such reasonable effort is made would the necessity of impoundment attach."

Third, by approving an ex post facto law making a prior conviction an essential element of a new crime, the state courts ignored the successive and multiple prosecution bar of OCGA 16-1-8, which "gives an

accused some protection from repeated prosecutions in those situations when the defense of double jeopardy is not available and yet the accused should not be warn down by multiple prosecutions deriving from the same conduct." Johnson v. State, 130 Ga. App. 134, 136 (1973).

Fourth, a defendant in Georgia has a statutory right to all statements, which must be complied with 10 days before trial. Petitioner's trial was sabotaged by a statement she allegedly gave that her husband had left her, a statement that consisted of the state's entire case to rebut equal access. Alleging the statute in question, OCGA 17-7-20 says it does not apply to "newly discovered evidence", the Supreme Court in this case ignored this language

and said the statute does not apply to "evidence discovered after a request is filed" (Appendix A, pg. 10a). Although the state claimed they discovered the new evidence at lunch, the statement was not revealed until the witness on the stand revealed it. Failure to interview a witness or a claim that in a previous interview that a witness was silent in the matter in issue does not meet the strictures of the second requirement of newly discovered evidence. Garnto v. Garnto, 247 Ga. 23, 24 (1981).

Fifth, the court here, for the first time in Georgia, allowed jurors to ask questions. See Stenner v. State, 151 Ga. App. 533 (1979) and Hall v. State, 241 Ga. 252 (1978), which "Make it clear that juror questions are not even a discretionary matter for the

court; they are simply precluded" Gregory (now a justice on the Supreme Court that issued the opinion complained of), Evidence, 32 Mer.L.Rev. 63, 68, fn D1 (1980).

Sixth, the courts refused to consider an enumeration of error concerning the prosecutor's improper closing argument because the Plaintiff "has not supplemented the record by any of the approved methods, OCGA 5-6-41" (Appendix A, pg. 12a). The trial court and the state acknowledged the improper statement in the record (T111). Previous decisions had acknowledged that this procedure for preserving error was proper and therefore failure to grant mistrial was error. Bethen v. State, 149 Ga. App. 312 (1979).

Seventh, the Georgia courts had

previously held that a charge on specific intent as to the gun possession charge was mandatory. Casper v. State, 13 Ga. App. 301 (1913). The court also had held that the defense of sudden emergency, put into the case of the Plaintiff, and unrebutted, was available. See, Foster v. State, 250 Ga. 269 (1982). The court dismissed the failure to make the charges without giving any reasoning or citing any authority.

Eighth, the court refused to make an in camera inspection of the prosecution's file for exculpatory material on the grounds that she did not point out "what material she believes to have been suppressed and show how she has been prejudiced" (Appendix, pg. 13a). The Petitioner did make this showing, at pages 23 and 70 of her

brief, and the failure to make the in camera inspection violates the Sixth and Fourteenth Amendments as set out in Brady v. Maryland, 373 U.S. 83 (1963).

In view of the plain erros here and the admission of the evidence Petitioner contends that the Georgia courts have arbitrarily and discriminatorily misapplied the Georgia law for the purpose of sustaining the petitioner's conviction. See Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697 (1969); NAACP v. Patterson, 357 U.S. 449, 78 S.Ct. 1163 (1958). As the court said in Bouie, 84 S.Ct. at 1703:

> (A)n unforseeable and unsupported state court decision on a question of state procedure does not constitute an adequate ground to preclude this court's review of a federal question.

See also Wright v. Georgia, 373 U.S. 248, 83 S.Ct. 1240, 1245 (1963), where the Supreme Court held that the Georgia Supreme Court erred in refusing (based on a procedural rule) to consider petitioner's appeal, saying petitioner "could not fairly be deemed to have been apprised of its existence." Although in this case there has been a failure to rule at all, the principles are the same.

If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that the state supreme court is barred by the due process clause from achieving precisely the same result by judicial construction. Bouie, supra, 84 S.Ct. at 1702.

The affirmance on these grounds by the Georgia courts was without an adequate determining principle and unreasoned. See United States v. Cornach, 329 U.S. 230, 67 S.Ct. 252,

258 (1946). And the decision held so little basis in law as to constitute a denial of due process. Wright, supra; Smith v. Twoney, 486 F.2d 736 (7th Cir. 1973).

CONCLUSION

For the reasons argued above, this Court should grant the writ and reverse Petitioner's conviction.

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APPENDIX A

In the Supreme Court of Georgia

Decided: September 7, 1983

39691. LEDESMA v. THE STATE

CLARKE, Justice.

Appellant appeals from her conviction for possession of a firearm by a convicted felon (OCGA 16-11-131) and for violation of the Controlled Substance Act. Following receipt of a teletype message from Missouri police that Miriam Ledesma was wanted for violation of the Missouri Controlled Substance Act, Fulton County and City of Atlanta police, who had assumed that an arrest warrant would be forthcoming from Missouri, arrested Ledesma.*

*On Motion for Rehearing this sentence was substituted for the sentence in the original opinion which said: "Following receipt of a teletype message from Missouri police to 'pick up' Miriam Ledesma, Fulton County and City of Atlanta police, who had been assured that an arrest warrant would be forthcoming from Missouri, arrested Ledesma."

She was stopped in her car and placed under arrest. Her car was searched and a gun was found in a zipped pouch. Following Ledesma's arrest her car was impounded and a warrantless inventory was conducted. A pill bottle containing Phentermine, a controlled substance, was found in the ash tray.

1. Ledesma contends that the trial court erred in overruling her motion for a directed verdict based on insufficiency of the evidence. In Georgia, where exclusive possession of an automobile is shown, the presumption is that the owner has possession of the property contained therein. This presumption is rebuttable and does not apply if it can be shown that a defendant has not been in possession or control for a period before discovery of contraband or where others have had equal

access to the automobile. Farmer v. State, 152 Ga.App. 792 (264 SE2d 235) (1979). Ledesma's entire defense rested upon a theory of equal access to the car by others, primarily her husband and her driver. The car had been purchased just over a month before the arrest. There was testimony by the arresting officer that she said that her husband, the co-owner of the car, had left her about a month prior to the arrest. She testified on direct examination that her husband was not presently living with her but that he had been living with her at the time of the arrest. As for the others who had access to the car, her testimony was that the driver and her sister had driven the car on "a couple" of occasions and that her son had driven it. On the day of the arrest the driver and a real

estate agent had been in the car. There was testimony that the pills were found in the ash tray and visible from the driver's seat. Ledesma testified she smoked and used the ash tray on the day of the arrest. It is for the trier of fact, in this case the jury, to judge the credibility of witnesses and to weigh their testimony. Young v. State, 232 Ga. 176 (205 SE2d 307) (1974); Redd v. State, 154 Ga.App. 373 (268 SE2d 423) (1980); Blanton v. State, 152 Ga.App. 205 (262 SE2d 476) (1979). In this case Ledesma was the sole occupant of the car of which she was the co-owner. She never testified that the gun and drugs were not hers. The jury decided that she had possession. The evidence was sufficient to withstand a motion for directed verdict. Cf. Speight v. State, 159 Ga.App. 5 (282 SE2d 651)

(1981), cert. den. 455 U.S. 947.

2. In her second enumeration of error, Ledesma claims that the court erred in overruling her motion to suppress the gun and pills confiscated from her car. The motion to suppress was properly denied. The gun was found in a lawful search incident to the arrest of Ledesma and was proper for that reason. Chimel v. California, 395 U.S. 752 (89 SC 2034, 23 LE2d 685) (1969). The pills were discovered during an inventory search conducted after the arrest. This search was also properly conducted without the requirement that a warrant be first produced. Chambers v. Maroney, 399 U.S. 42 (90 Sc 1975, 26 LE2d 419) (1970).

3. Ledesma assigns error to the trial court's overruling her challenge to OCGA 17-13-34 as violating the Fourth, Fifth, and Fourteenth Amendments in that it

warrant had been actually issued in Missouri for her arrest.* In Georgia, if probable cause to arrest exists, a warrantless arrest is lawful. Durden v. State, 250 Ga. 325 (297 SE2d 237)(1982); Vaughn v. State, 247 Ga. 136 (274 SE2d 479)(1981). The arresting officers testified at trial that they believed that a warrant had been issued in Missouri. This belief was based on reliable information from Missouri officials that the issuance of a warrant was imminent charging her with a violation of the Missouri Controlled Substance Act. When they received the message that Miriam Ledesma was wanted, they interpre-

*On Motion For Rehearing this sentence was also substituted for the original sentence which said: "Ledesma further contends that her arrest was invalid under the statute because at the time the teletype arrived from Missouri saying 'Pick up Miriam Ledesma,' and at the time she was arrested in Fulton County, no warrant had actually been issued in Missouri for her arrest."

ted this to mean that the warrant had been issued. Even if this mistaken interpretation did not meet the requirement of the statute that the officers have reasonable information that she was charged in the courts of another state with a crime punishable by death or a prison term exceeding one year, it does amount to probable cause to arrest which is the applicable standard for a warrantless arrest in Georgia.

4. The constitutional attack on OCGA 16-11-131, which punishes possession of a firearm by a convicted felon on the basis that it constitutes an ex post facto law, is without merit. In Landers v. State, 250 Ga. 501 (99 SE2d 707)(1983), we dispose of this argument, holding that the applicable date is the date of the offense of possession, not the date of

the previous felony conviction. It is also clear that application of OCGA 16-11-131, which punishes a discrete crime, subjects a defendant to neither double jeopardy nor multiple prosecutions for the same offense.

5. Ledesma's fifth enumeration of error is that the court admitted over objection made by the defendant which was not furnished to defendant even though she made a proper request. She argues that the state did not meet the requirements of OCGA 17-7-210. The statement in question here was Ledesma's statement to one of the arresting officers that her husband had left her about a month prior to the arrest. The defendant moved for a mistrial on the ground that the statement was admitted although it had not been furnished to defendant after a proper re-

quest. OCGA 17-7-210(e) provides that the section will not apply to evidence discovered after a request is filed. The district attorney stated that he was not aware of the statement until lunch time on the day of the officer's testimony. The sanctions for failing to supply the statements are thus not applicable. Ellison v. State, 158 Ga.App. 419 (280 SE2d 371)(1981). This statement, unlike that in Walraven v. State, 250 Ga. 401 (297 SE2d 278)(1982), relied upon by Ledesma, was not directly inculpatory but was relevant only in rebuttal to the theory of equal access developed by Ledesma at trial. The statement in and of itself is neither inculpatory nor exculpatory. Considering all the circumstances we find that the admission of the statement was not error.

6. The enumeration of error complain-

ing that the state did not prove chain of custody of the pills found in Ledesma's car is without merit. A review of the transcript reveals that any discrepancy between the testimony of the officers who had custody of the evidence is inconsequential. The state established a "reasonable assurance" of the identity of the pills. Dent v. State, 243 Ga. 854 (257 SE2d 241)(1979); Printer v. State, 237 Ga. 30 (226 SE2d 578)(1976). Ledesma, on the other hand, has shown no more than the bare possibility of tampering.

7. Ledesma's complaint as to the court's allowing the state to address questions propounded by the jury after the close of the evidence was not raised below and cannot be raised on appeal. Further, the judge carefully instructed the jury that the evidence was closed.

He also instructed counsel that they must not go beyond the evidence in addressing the questions of the jury during closing argument. We find no harm in the court's allowing counsel for both sides an opportunity to address the jury questions so long as no new information was injected into the arguement.

8. Since closing arguments of the attorneys were not reported, and since Ledesma has not supplemented the record by any of the approved methods, OCGA 5-6-41, the enumeration dealing with improper closing argument by the district attormey is deemed abandoned.

9. There was no error in the court's charging the language of OCGA 16-11-131 or in refusing to charge sudden emergency, specific intent, or OCGA 16-11-126(c), which concerns carrying a concealed weapon.

10. The last enumeration of error deals with the failure of the court to order exculpatory material be turned over to defendant. At the hearing on Ledesma's motion to suppress she requested as part of a Brady motion that the court inspect the file of the Fulton County Sheriff's office as to the communication between that office and authorities in Missouri. The trial judge agreed to inspect the file. If the appellant desires to have this inspection reviewed by this court, she must point out what material she believes to have been suppressed and show how she has been prejudiced. Since Ledesma has not made this showing, we find this enumeration to be without merit. Welch v. State, ___Ga.___ (Case No. 39754, decided June 29, 1983); Burke v. State, 248 Ga. 124 (281 SE2d 607)(1981); Wilson v. State, 246 Ga.

62 (268 SE2d 895)(1980).

Judgment affirmed. All the Justices concur except Smith, J., concurs in the judgment only.

APPENDIX B

October 5, 1983

The Motion for Rehearing is denied today.

All the Justices concur.

Pages one and three of the attached opinion have been changed on motion for rehearing.

APPENDIX C

OCGA 16-11-131 Possession of firearms by convicted felons prohibited; exceptions.

(a) As used in this code section, the term:

(1) "Felony" means any offense punishable by imprisonment for a term of one year or more and includes a conviction by a court martial under the Uniform Code of Military Justice for an offense which would constitute a felony under the laws of the United States.

(2) "Firearm includes any handgun, rifle, shotgun, or other weapon which will or can be converted to expel a projectile by the action of an explosive or electrical charge.

(b) Any person who has been convicted of a felony by a court of this state or any other state; by a court of the United States including its territories,

possessions, and dominions; or by a court of any foreign nation and who receives, posesses, or transports any firearms commits a felony and, upon conviction thereof, shall be imprisoned for not less than one nor more than five years.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of this Petitioner, by mail, upon the attorney for Respondent:

Ben Oehlert
Assistant District Attorney
Fulton County Courthouse
160 Pryor Street, S.W.
Atlanta, GA 30303

This _____ day of November, 1983.

J.M. Raffauf